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COLUMBIA | GREENVILLE

December 19, 2005

VIA EMAIL & HAND DELIVERY

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Synergy Business Park, Saluda Building
101 Executive Center Drive
Columbia, SC 29210

**Re: Generic RFP Docket
Docket No. 2005-191-E**

Dear Mr. Terreni:

Enclosed for filing please find the Post-Hearing Brief of Newsouth Energy LLC. By copy of this letter we are serving the same on all parties of record. Please date-stamp the extra copies of the testimony as proof of filing and return them with our courier. If you have any questions, please have someone on your staff contact me.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

/lwf
Enclosure

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**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NO. 2005-191-E

IN THE MATTER OF:

Generic Proceeding to Explore a Formal
Request for Proposal for Utilities that
are Considering Alternatives for Adding
Generating Capacity

**POST-HEARING BRIEF OF
NEWSOUTH ENERGY LLC**

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INTRODUCTION

This proceeding began at the behest of Columbia Energy LLC, an affiliate of NewSouth Energy LLC ("NewSouth"). Columbia Energy proposed that the Public Service Commission of South Carolina ("Commission") initiate a rulemaking on competitive bidding during South Carolina Electric & Gas Company's ("SCE&G") 2004 rate case, Docket No. 2004-178-C. In Order No. 2005-2 in the SCE&G docket the Commission determined that the use of a formal competitive solicitation process, under appropriate circumstances, could produce low-cost, reliable power resources for South Carolina consumers. In the SCE&G docket the Commission also issued Order No. 2004-149, in which it indicated that as part of its examination/education process regarding competitive bidding, a generic docket would be opened in order for the Commission to make an informed, educated decision on whether to pursue a rulemaking regarding request for proposals ("RFP") and competitive bidding.

As a result of these orders on July 12, 2005, the Commission established Docket No. 2006-191-E and issued a Notice of Generic Proceeding to explore a formal request for proposal process for utilities that are considering alternatives for adding generating capacity. A hearing was held in this docket on October 26, 2005. NewSouth submits its post-hearing brief to address several issues concerning implementation of an RFP process for South Carolina.

THE COMMISSION SHOULD PURSUE RULEMAKING PROCEDURES FOR AN RFP PROCESS

The primary question to be answered in this generic docket is whether the Commission should move forward with a rulemaking proceeding to establish an RFP process for utilities that are considering alternatives for adding generating capacity. As the Commission correctly noted in Order No. 2005-149, this generic proceeding was established in order for the Commission to examine and educate itself regarding the RFP process "...in order for the Commission to make an informed educational decision on whether to pursue a rulemaking regarding RFPs and competitive bidding." Order No. 2005-149, p. 30-4.

Under the South Carolina Administrative Procedures Act, in order to establish binding rules for an RFP process applicable to all jurisdictional electric utilities, the Commission must promulgate a regulation. A regulation is a legislative rule which has the force and effect of law and becomes an integral part of the statute. *Faile v. S.C. Employment Security Com'n*, 267 S.C. 536, 230 S.E. 2d 219, 221 (1976).

A "regulation" is defined under the APA as an

agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.

S.C. Code § 1-23-10(4).

Regulations can only be promulgated by following the Administrative Procedures Act's provisions set forth in S.C. Code Section 1-23-110 which are subject to approval by the General Assembly pursuant to S.C. Code Section 1-23-120. Therefore, the Commission should promulgate a regulation in order to establish RFP requirements.

THE COMPETITIVE BIDDING PROCESS IS IN THE PUBLIC INTEREST

The Commission has now given all jurisdictional electric utilities the opportunity to provide their opinions on a competitive bidding process in this public information gathering proceeding. The testimony in this proceeding overwhelmingly indicates the establishment of an RFP process in South Carolina is in the public interest. Duke, Progress, and SCE&G all indicated that in some cases an RFP process is appropriate in order to ensure that their acquisition of capacity is the prudent thing for the company to do.

Mr. Waters of Progress Energy testified that an RFP might serve as a valuable means to identify market opportunities. "Before proceeding with a self-build option, it is in the best interest of customers to consider whether there are any purchased power alternatives available that might maintain the system reliability level in a more cost-effective manner. This is where a Request for Proposal (RFP) might provide a valuable means of identifying market opportunities." (Tr. at 34, l. 20 – 35, l. 2).

Duke's witness Ms. Hager also noted that RFPs can be useful to identify resource options. "Duke currently utilizes RFPs for some new resource acquisitions and is looking at expanding that use when it makes economic sense for our customers. As Duke has demonstrated over the past ten years, the Company will utilize RFPs when we believe that the use of this device will benefit our customers." (Tr. at 63, l. 1-5). See also Tr. at 65, l. 14-16.

Mr. Cunningham of SCE&G testified that it used an RFP during the Urquhart repowering project to analyze the company's available options. Although Mr. Cunningham contends that an RFP is not always necessary or helpful, he also admits

that when “we were deciding on the next increment of supply which ended in the Urquhart Re-Powering project, we felt it important to issue an RFP because at the time there was a lot of independent power plant development, a lot of sellers in the market and an RFP would help understand what purchasing options were available in this very rapidly developing market. ” (Tr. at 122, l. 20 – 123, l. 1).

SCE&G, Duke, and Progress have all recommended that the Commission not move forward with a formal RFP process. They offer the following purported reasons why an RFP process should only be implemented when they say so:

1. A formal RFP process alters the utility planning process and dampens utility planning responsibility and business judgment.
2. A formal RFP process reduces utility planning flexibility and options.
3. A formal RFP process can potentially increase costs to ratepayers.
4. A formal RFP process is an unnecessary burden and is time consuming.

(Tr. at 250-251). In response to these stated concerns NewSouth offered the testimony of Dr. David Dismukes. Dr. Dismukes addressed each of these issues, noting that many states require competitive bids and that the same business judgment being used to develop each utilities’ integrated resource plans would continue to be used with a formal RFP process. Business judgment is used to determine which and how many resources will be needed. It would also be used in determining the resource need to be submitted to the market, the timing, the location, and any special operating characteristics. (Tr. at 253-254).

Dr. Dismukes also noted that other states have dealt with flexibility issues by

including waiver provisions that allow regulated utilities the opportunity to bring a pressing resource need or exceptionally good deal to the Commission without having to go through the RFP process. He agrees with the jurisdictional utilities that the RFP process should include flexible evaluation criteria to be changed with each resource need. (Tr. at 261-263).

Dr. Dismukes disagreed with the criticism that a formal RFP process would increase costs to the ratepayers. The costs associated with any RFP process must be compared to the resulting benefits. The fact that these same utilities have already used some kind of RFP processes in the past indicates that the costs are not greater than the benefits. Some states have addressed this issued by requiring participating submitters to pay bid evaluation fees to cover the costs thereby minimizing the impact. (Tr. at 263-264).

Dr. Dismukes also addressed the utilities' concerns that a formal RFP process is time consuming and burdensome. Most competitive bidding rules are developed within the context of the overall planning process. If the process works as many states have planned, it would be conducted in a collaborative, rather than litigious fashion. The process should contain a waiver provision to be exercised if unanticipated opportunities or challenges arise. The fact that the utilities have conducted voluntary RFP processes in the past suggests that they can accommodate an RFP process within the timing of their own resource needs. (Tr. at 265).

The issues raised by Duke, SCE&G and Progress are not new. Competitive bidding has existed for a number of years and has been used by several states because it offers a number of benefits for ratepayers. Dr. Dismukes testified about the current

rules in effect in a number of states and composed the following list of characteristics of a good competitive bidding rule:

- (1) Consistent and complements the existing utility planning process;
- (2) Expeditious yet deliberate;
- (3) Transparent;
- (4) Maintains confidentiality;
- (5) Flexible;
- (6) Objective; and
- (7) Independent.

(Tr. 224 – 234). An RFP process incorporating these characteristics is in the best interest of the ratepayers since it ensures greater levels of participation which in turn provides diverse resource offerings.

Duke, SCE&G and Progress have all also acknowledged that they use RFPs in their planning processes. Mr. Waters testified that Progress frequently and voluntarily utilizes RFPs in making resource selection decisions. (Tr. at 53). Duke has used the competitive bidding process extensively over the past ten years. (Tr. at 65 & 83). SCE&G constantly monitors the markets for electric energy and capacity. When it appears that the market may be able to supply its needs, SCE&G polls the market informally or through the issuance of formal RFPs. (Tr. at 109-110).

These companies would not be using the RFP process if they did not think the process was valuable. Although they raise issues associated with reliability and flexibility these same utilities have offered RFPs in the past which benefited ratepayers while addressing these issues. They found ways to make sure the benefits outweighed the costs associated with a competitive bidding process. (Tr. at 272). An RFP process would be in the public interest since it would ensure that customers and ratepayers get the least-cost, most reliable source of generation available in the market.

COMPETITIVE BIDDING PROVIDES A CHECK ON INVESTMENTS

The electric utilities have a built-in bias in favor of building generation assets due to their obligation to shareholders to maximize their investment. A competitive market provides a check on the type and costs of the investments made by the utilities. An RFP process would allow the Commission to review all of the options and prices available to determine the best deal for ratepayers. The decision-making process is easier when a wide range of market information is presented for consideration. (Tr. at 202-206, 254).

Ratepayers benefit from a well-designed RFP process in a number of ways. It can help keep rates down by ensuring that only the least-cost resource is used. An RFP process creates opportunities for risk management by offering greater supply options, creates an environment favorable to supply diversity in the number and type of suppliers, and is favorable to future investments in generation particularly from competitive firms. (Tr. at 206). An RFP process puts competitive pressure on utilities to ensure that they develop and propose the most cost-effective projects. (Tr. at 253). A competitive bidding process encourages the development of alternatives which increases the chances of identifying a supply resource which is better than the utility resource. An RFP process which competitively tests and evaluates the reasonableness of a utility self-build against non-utility proposals is the most effect way to determine whether the needs of South Carolina ratepayers are met in a reliable manner and at the lowest costs. (Tr. at 296).

In addition, the Southeastern region has ample generation supplies and can support a competitive bidding process in South Carolina. South Carolina has three

independent power providers who have already created a number of benefits in terms of increased local spending, employment opportunities, and an increased property and sales tax base. (Tr. at 221-223).

CONCLUSION

Adopting a competitive bidding rule for utilities considering adding resource capacity would be in the public interest and would establish a check on the type and costs of investments made by regulated utilities. In order to establish requirements that would apply to all South Carolina jurisdictional electric utilities, the Commission should move forward with a rulemaking to implement a competitive bidding process.

Dated this 19th day of December, 2005.

ROBINSON, MCFADDEN & MOORE, P.C.



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This is to certify that I, Lori W. Foy, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Post-Hearing Brief of NewSouth Energy LLC** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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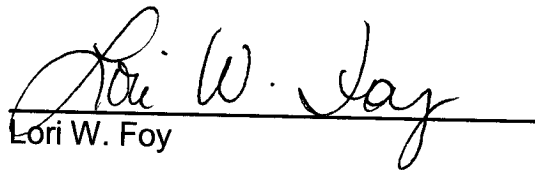
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Dated at Columbia, South Carolina this 19th day of December, 2005.


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